Petition

Office-Supreme Court, U.S.
FILED
DEC 28 1981
ALEXANDER L. STEVAS,
CLERK

81-1182

No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1981

H. O. PETERSON, JR., and ALMA PETERSON,
Petitioners,

v.

UNITED STATES OF AMERICA
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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December 1981

THE CASILLAS PRESS, INC.–1717 K Street, N. W.–Washington, D. C.–223-1220

QUESTIONS PRESENTED

1. Whether the United States is insulated from liability under the Federal Tort Claims Act where

(a) an "active duty" serviceperson receives allegedly negligent medical care in a military hospital for a non-service-connected mental illness, and

(b) the serviceperson was not in the hospital pursuant to military orders, nor performing any military activity at the time of receiving such negligent medical care.

2. Whether the doctrine of *Feres* v. *United States,* 340 U.S. 135, 146 (1950), to the extent that it precludes suits against the United States for injuries to servicepersons that "arise out of or are in the course of activity incident to service," should be reconsidered, limited, clarified or overruled.

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No.

H. O. PETERSON, JR., and ALMA PETERSON,
Petitioners,

v.

UNITED STATES OF AMERICA
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The petitioners, H. O. Peterson, Jr., and Alma Peterson, respectfully request that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding on August 26, 1981.

OPINIONS BELOW

The per curiam opinion of the Eleventh Circuit (then known as Unit B of the Fifth Circuit), entered on August 26, 1981, was marked "Do Not Publish." It is reprinted in the Appendix hereto, p. 1a, *infra.*

The memorandum order of the United States District Court for the Southern District of Georgia, Augusta Division, entered on January 8, 1981, is unreported. It is reprinted in the Appendix hereto, p. 3a, *infra.*

JURISDICTION

This action was brought in the Southern District of Georgia under the Federal Tort Claims Act, 28 U.S.C. § 2671, *et seq.*, and its jurisdictional complement, 28 U.S.C. § 1346(b). The District Court dismissed the action on January 8, 1981. See Appendix, p. 3a, *infra.*

The Eleventh Circuit (then known as Unit B of the Fifth Circuit) affirmed the District Court's action, its judgment being entered on August 26, 1981. See Appendix, p. 2a, *infra.* On November 9, 1981, Justice Powell signed an order extending the time for filing this petition for certiorari to and including December 24, 1981.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(l).

STATUTES INVOLVED

Federal Tort Claims Act, 28 U.S.C. § 1346(b):

> . . . the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Federal Tort Claims Act, 28 U.S.C. § 2674:

> The United States shall be liable, respecting the provisions of this title relating to tort claims,

in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

STATEMENT OF THE CASE

On February 2, 1978, Captain Alan Dale Peterson of the United States Army Veterinary Corps died at Fort Gordon, Georgia, from a self-inflicted bullet wound. He was the son of the petitioners herein.

The petitioners instituted this action under the Federal Tort Claims Act in 1980, seeking judgment against the United States in the amount of $500,000, plus costs, for the alleged wrongful death of their son. The complaint alleged that the suicide was the direct and proximate result of "negligent treatment and lack of proper treatment, while under the care and treatment of psychiatrists and other medical personnel of the Department of the Army at Eisenhower Hospital at Fort Gordon, Georgia." The complaint further alleged that the medical personnel at Fort Gordon, while acting within the scope of their agency and employment, "negligently failed to provide adequate and proper medical and psychiatric care for said Alan D. Peterson by, *inter alia,* failing to diagnosis [sic] properly his mental illness, and failing to hospitalize said Alan D. Peterson after demand and with knowledge of his [non-service-connected] mental illness and prior suicide attempts." Paragraphs 5, 6.

The critical allegations of the complaint asserted that the allegedly negligent treatment and the resulting suicide occurred while Captain Peterson was "on a non-duty status and while mentally ill." Paragraphs 5, 7. Without filing an answer denying the allegations of negligent treatment, the United States moved for dismissal or, alter-

natively, for summary judgment on the ground that Captain Peterson at all times during his eight-month Army career was on active duty.

The United States submitted two affidavits, one by Captain Peterson's superior officer and the other by the Army psychiatrist who had treated him throughout his Army service. Both testified that Peterson had been "an active duty servicemember" at all times, including those periods when he was attending the frequent therapeutic sessions with the psychiatrist. Also submitted was the official Army report of the suicide, which described the duty status at that point as "ACTIVE: EXCUSED ABSENCE." The report added that Peterson "was not mentally responsible at the inception of his unauthorized absence [a four-day period immediately preceding his death on February 2, 1978] and he was not mentally responsible at the time of his death."

On January 8, 1981, the District Court granted the motion to dismiss, finding that Captain Peterson "was an active-duty serviceman who was entitled to receive medical care at the Eisenhower Army Medical Center" and that such care had been provided "in the form of psychiatric treatment for approximately eight months prior to Peterson's death." The court concluded that Peterson "was receiving psychiatric treatment at the Eisenhower Medical Center because he was a military serviceman," and that "[a]ny negligence on the part of his doctor was incidental to Peterson's military service." Appendix, p. 4a, *infra.*[1]

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[1]The District Court made no findings or conclusions respecting the alleged negligence of the Army psychiatrist who treated Captain Peterson. Nor did the court deny or even address the allegation in paragraph 9 of the complaint that if the United States were a private person "it would be liable to Plaintiffs in accordance with the law of the State of Georgia, particularly Georgia Acts 1979, pp. 446, 493

The District Court grounded its dismissal on this Court's ruling in *Feres* v. *United States,* 340 U.S. 135 (1950). The *Feres* ruling was summarized by the District Court as an announcement "that the government could not be held liable under the Federal Tort Claims Act (FTCA) for injuries to service members where the injuries arose out of or in the course of activity incident to service." Appendix, p. 3a, *infra.* The court added that in *Feres* this Court "specifically held that there could be not [sic] recovery against the United States for the negligence of an army surgeon," citing 340 U.S. at 146. Finally, borrowing a thought from a recent Fifth Circuit opinion, *Johnson* v. *United States,* 631 F.2d 34, 36 (5th Cir. 1980),[2] the District Court stated: "Medical care received by service members in military hospitals is so entwined with their military status that an action cannot be brought under the FTCA for the negligent provision thereof." Appendix, p. 4a, *infra.*

Thus the essence of the District Court's ruling is that the United States is insulated from liability under the FTCA

(Ga. Code Ann. Section 74-108(b))." See *Tate* v. *McCall Hospital,* 57 Ga.App. 824, 196 S.E. 906 (1938), imposing liability on a hospital for a patient's suicide when the suicide is deemed to be the proximate result of a breach of the hospital's duty of care.

[2]In *Johnson,* described by the District Court below as a case "remarkably similar to the one at bar," the Fifth Circuit said: "To the extent Sgt. Johnson's death [by suicide] is attributable to release from the hospital, the courts have consistently followed *Feres* and held that the medical care given servicemen in army hospitals is so entwined with the military relationship that a serviceman cannot bring an action under the FTCA for the negligent provision thereof."

On May 26, 1981, this Court denied certiorari in the *Johnson* case, No. 80-1678. The *Johnson* petition for certiorari did not present any of the questions presented in the instant petition. The *Johnson* petition sought merely to fit the facts of that case outside the *Feres* factual patterns.

for any negligent treatment of Captain Peterson's mental illness because (a) he was on "active duty" when he was treated, and (b) treatment received in a military hospital is "entwined with the military relationship" created by such "active duty" status. The Eleventh Circuit agreed with that analysis. In its unpublished per curiam, Appendix, p. 1a, *infra,* the Eleventh Circuit wrote:

> In deciding that plaintiffs have no Federal Tort Claims Act remedy for the suicide of their army officer son, which allegedly resulted from the negligent medical treatment of an Army psychiatrist, the district court properly relied on *Johnson* v. *United States,* 631 F.2d 34 (5th Cir. 1980), *cert. denied,* ____ U.S. ____ (1981). On facts which are legally indistinguishable from the ones here, this Court held such action barred by the *Feres* doctrine. Like the district court, we are bound by that decision.

REASONS FOR GRANTING THE WRIT

1. The decision below misinterprets and misapplies the "incident to service" standard of the Feres doctrine

The decision below is an unfortunate precedent. It insulates the United States from Federal Tort Claims Act liability for any injuries wrongly inflicted on "active duty" servicepersons receiving medical care in a military hospital. Under the court's reasoning, providing medical care for a serviceperson in a military hospital "is so entwined with the military relationship" – presumably the relationship between the serviceperson and the military establishment – that the negligent slip of the surgeon's knife must be deemed "to arise out of . . . activity incident

to service" within the meaning of *Feres* v. *United States*, 340 U.S. 135, 146 (1950). That cannot be.

Many lower courts have discovered that the "incident to service" standard of *Feres* "has many deficiencies as a basis for exclusion under the Federal Tort Claims Act." E.g., *Hale* v. *United States*, 416 F.2d 355, 358 (6th Cir. 1969). But that standard is crystal clear in its insistence that the activity giving rise to the serviceperson's injury be incident to that person's military duty, such as the activity of "performing duties under orders," or performing military functions "under compulsion of . . . orders or duty [or] on . . . military mission." 340 U.S. at 146. The court below simply forgot or ignored this military nexus component of the *Feres* "incident to service" standard. Building on Fifth Circuit precedent, the new Eleventh Circuit has decreed that medical care provided "active duty" servicepersons in military hospitals is necessarily an activity "incident to service." That notion applies even where the illness being treated in the hospital is not service-connected, as is true in the instant case.

Such an alteration in the "incident to service" concept is contrary to the language used by this Court in establishing and referring to the concept. The *Feres* opinion itself makes paramount the military nexus component.[3] Opinions of this Court following *Feres* have done likewise. Thus *United States* v. *Brown*, 348 U.S. 110, 113 (1954),

[3]In *Feres*, 340 U.S. at 146, the Court also distinguished its prior decision in *Brooks* v. *United States*, 337 U.S. 49 (1949), by noting that the situation in *Brooks*, where the soldiers had been on furlough when injured, "is not analogous to that of a soldier injured while performing duties under orders." *Brooks* allowed recovery on behalf of soldiers on leave who were struck by a negligently-driven Army truck on a state highway. The Court there noted that this accident "had nothing to do with the Brooks' army careers" and was "not incident to the Brooks' service." 337 U.S. at 52.

pointedly referred to "the line drawn in the *Feres* case between injuries that did and injuries that did not arise out of or in the course of military duty." And in *Stencel Aero Engineering Corp.* v. *United States,* 431 U.S. 666 (1977), the Court emphasized the *Feres* military nexus component by describing the excludable "injuries sustained incident to military service" (at 668) and injuries that attend military movements of "large numbers of men, and large quantities of equipment, from one end of the continent to the other, and beyond" (at 672). Significantly missing from these descriptions are non-service-connected illnesses that are negligently treated in military hospitals.

The thought was expressed below that a "military relationship" nexus can be extracted from the medical care given servicepersons in military hospitals. But that misses the essential nature and rationale of the nexus. As explained in *Brown,* 348 U.S. at 112, the Tort Claims Act excludes suits for injuries arising out of activities incident to military service primarily because of

> The peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty, . . .

See also *United States* v. *Muniz,* 374 U.S. 150, 162 (1963). The Court further observed in *Stencel,* 431 U.S. at 673, that if a case arising out of a true military nexus were allowed to go to trial, it would "involve second-guessing military orders, and would often require members of the Armed Forces to testify in court as to each other's decisions and actions."

What goes on in a military hospital in treating a soldier's non-service-connected illness or injury in no way implicates this "special relationship of the [ill] soldier to his [military] superiors." The soldier is usually not in the hospital as the result of a military command; he is there because he needs medical attention. Thus to allow suit under the Act for negligent medical treatment can have no "effects . . . on discipline," nor "involve second-guessing military orders." No, the real relationship in a military hospital is that between patient and doctor. The military status of each is subordinate to that relationship. Indeed, the "active duty" status of an ill soldier in a military hospital is not only subordinate. It is also irrelevant.

To preclude a Tort Claims Act suit in this context produces several evils. Just relief is denied those who are negligently treated in military hospitals for non-service-connected injuries and illnesses. Gone is the deterrent effect of the threat of malpractice claims under the Tort Claims Act, a threat that often impels medical personnel to improve their medical techniques. On the other hand, the preclusion of this kind of suit has no effect whatever on protecting or advancing military discipline – the principal factor justifying the *Feres* doctrine.

This Court should review the decision below, lest this patent misreading of the *Feres* doctrine become further embedded in the thicket of Tort Claims Act jurisprudence.[4]

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[4]The summary per curiam treatment given this case by the Eleventh Circuit reflects a growing trend among appellate courts not to accept the responsibility for clarifying the *Feres* doctrine. Increasing numbers of *Feres*-type appeals are being dealt with in this fashion, with a minimum analysis of the law and facts. See Note, *The Federal Tort Claims Act: A Cause of Action for Servicemen,* 14 Valparaiso Univ. L. Rev. 527, 570, n.230 (1980).

2. Lower federal courts need clarification of the military ingredient of the Feres "incident to service" standard

Few areas of federal statutory law are more muddled and confusing to lower courts than the military exception to the Tort Claims Act created by this Court in *Feres*. This uncertainty has manifested itself in numerous conflicting opinions among the lower courts attempting to interpret the dispositive factors of the *Feres* exception. As summarized in a recent law review study, Note, *The Federal Tort Claims Act: A Cause of Action for Servicemen,* 14 Valparaiso Univ. L. Rev. 527, 557-568 (1980), the lower courts have developed different and conflicting tests for applying the *Feres* "incident to service" concept;

1. Some courts recognize that an injury arises from an activity incident to service if it stems from an official military relationship between the tortfeasor and the serviceperson (*Harten* v. *Coons,* 502 F.2d 1363 (10th Cir. 1974), *cert. denied,* 420 U.S. 963), whereas the First Circuit holds that *Feres* bars recovery without such a relationship (*Hall* v. *United States,* 451 F.2d 353, 354 (1st Cir. 1971).

2. Courts are also in conflict as to whether recovery under the Act is dependent upon the type of activity the serviceperson was performing at the time of injury. The Sixth Circuit bars a cause of action only if the serviceperson was in fact performing military duties (e.g., *Hale* v. *United States,* 452 F.2d 668 (6th Cir. 1971); *McCord* v. *United States,* 377 F.Supp. 953 (M.D.Tenn.) *aff'd without opinion,* 477 F.2d 599 (6th Cir. 1972)). But the Fifth Circuit seems to hold that liability depends not on the activity performed but on the impact a suit for damages would have on the military system (e.g., *Bankston* v. *United States,* 480 F.2d 495 (5th Cir. 1973); *Mason* v. *United*

States, 568 F.2d 1135 (5th Cir. 1978)). The Fifth Circuit line of decision has led to holdings that the active duty status of a serviceperson in a military hospital or on a military base at the time of injury precludes any cause of action under the Act (*Coyne* v. *United States,* 411 F.2d 987 (5th Cir. 1969); *Johnson* v. *United States,* 631 F.2d 34 (5th Cir. 1980)). Thus the Eleventh Circuit's ruling in the instant case, which rather blindly follows the Fifth Circuit's decision in *Johnson,* creates a conflict with the above-mentioned Sixth Circuit decisions.

3. Federal courts have also created a variety of conflicting tests for determining whether and when the *Feres* concept applies. Some courts, like the Eleventh Circuit in this case and the Fifth Circuit in the above-cited decisions, use a general "but for" test: the United States is not liable for any injuries that occur in a place (such as a military hospital) to which the serviceperson would not have been admitted but for status as an "active duty" serviceperson. Other courts apply a "line of duty" test – was the serviceperson acting in the line of duty at the time of the injury? See *Shaw* v. *United States,* 448 F.2d 1240 (4th Cir. 1971). Still other courts have manufactured a "military discipline" test; if the injury occurred while the serviceperson was subject to military discipline, then the injury was "incident to service." See *Archer* v. *United States,* 217 F.2d 548 (9th Cir. 1954), *cert. denied,* 348 U.S. 953.

Not surprisingly, these differing tests have resulted in non-uniform judicial treatment of servicepersons' injuries. A serviceperson who lives in one part of the country may recover, while a similarly-injured person in another part of the country may be barred from asserting a claim.

What is needed is a uniform and workable standard for applying the *Feres* "incident to service" concept. Only this

Court can supply this needed uniformity. Perhaps such a standard can be found by piecing together what this Court said in *Feres* and *Brown,* as well as in *Stencel* and *Brooks v. United States,* 337 U.S. 49 (1949). Out of those four cases emerges a consistent theme. The theme is that a serviceperson is to be denied recovery under the Tort Claims Act only where the injury occurred while the serviceperson was acting under compulsion of military orders or duties, or was engaged in a military mission or operation.

That theme seems clear enough from the face of this Court's opinions, as the first reason advanced in this petition points out. The difficulty is that some courts, like the Eleventh Circuit, refuse to reread this Court's declarations with an eye to perceiving that unifying military nexus principle. Many courts have simply defined and indeed tortured the "incident to service" language in *Feres* beyond recognition. And they have done so without reference to the military nexus component of that language, which shines through so clearly in this Court's opinions.

The *Feres* situation has become so confused, and the denial of servicepersons' claims for legitimate relief has become so notorious, that commentators are beginning to call for the abolishment of the *Feres* rule. See Note, *From Feress to Stencel: Should Military Personnel Have Access to FTCA Recovery?* 77 Mich.L.Rev. 1099, 1126 (1979). But before that drastic result is reached, this Court should heed the growing requests of the lower courts that the *Feres* doctrine be clarified and unified. See *Peluso* v. *United States,* 474 F.2d 605, 606 (3d Cir. 1973), *cert. denied,* 414 U.S. 879 ("If the matter were open to us, we would be receptive to appellant's argument that *Feres* should be reconsidered, and perhaps restricted to injuries occurring directly in the course of service. But the case is controlling. Only the Supreme Court can reverse it . . .

Certainly the facts pleaded here, if true, cry out for a remedy").

As the Ninth Circuit recently noted, *Monaco* v. *United States,* 661 F.2d 129, 134 (9th Cir. 1981), "The *Feres* doctrine today stands on shaky ground with its precise justification somewhat confused." The instant petition presents an opportunity to stabilize that ground.

CONCLUSION

For these reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted.

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December 1981

APPENDIX

IN THE
United States Court of Appeals
For the Fifth Circuit
Unit B

No. 81-7199
Summary Calendar

H. O. PETERSON, JR., and ALMA PETERSON,
Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA
Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA
(August 26, 1981)

DO NOT PUBLISH

Before RONEY, KRAVITCH, and THOMAS A. CLARK, Circuit Judges.

PER CURIAM:

In deciding that plaintiffs have no Federal Tort Claims Act[1] remedy for the suicide of their army officer son, which allegedly resulted from the negligent medical treatment of an Army psychiatrist, the district court properly relied on *Johnson v. United States,* 631 F.2d 34 (5th Cir. 1980), *cert. denied,* ____ U.S. ____ (1981). On facts which are legally indistinguishable from the ones here, this Court

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[1] 28 U.S.C. § 2671 *et seq.*

held such action barred by the *Feres*[2] doctrine. Like the district court, we are bound by that decision.[3]

AFFIRMED.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Georgia, and was taken under submission by the Court upon the records and briefs on file.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby affirmed;

IT IS FURTHER ORDERED that the appellants pay to the appellee the costs on appeal, to be taxed by the Clerk of this Court.

August 26, 1981

[2]*Feres v. United States,* 340 U.S. 135 (1950).

[3]*See also Stencel Aero Engineering Corp. v. United States,* 431 U.S. 666 (1977); *Stanley v. Central Intelligence Agency,* 639 F.2d 1146, 1150-51 (5th Cir. 1981); *Veillette v. United States,* 615 F.2d 505 (9th Cir. 1980); *Henning v. United States,* 446 F.2d 774 (3d Cir. 1971), *cert. denied,* 404 U.S. 1016 (1972).

APPENDIX

IN THE
United States District Court
For the Southern District of Georgia
Augusta Division

Civil Action No. 180-141

H. O. PETERSON, JR., and ALMA PETERSON,
Plaintiffs

v.

UNITED STATES OF AMERICA
Defendant

ORDER

This is a wrongful death action brought under the Federal Torts Claim Act, 28 U.S.C. § 2671, *et seq.* Plaintiffs allege that their son's suicide was the result of negligent medical treatment received at Eisenhower Army Medical Center, Fort Gordon, Georgia. The United States contends that it is insulated from liability by application of the *Feres* doctrine, and has moved to dismiss the case, or in the alternative, for summary judgment.

In *Feres v. United States,* 340 U.S. 135 (1950), the Supreme Court announced that the government could not be held liable under the Federal Torts Claims Act (FTCA) for injuries to service members where the injuries arose out of or in the course of activity incident to service. The Court specifically held that there could be not recovery against the United States for the negligence of an army

surgeon. 340 U.S. at 146. Medical care received by service members in military hospitals is so entwined with their military status that an action cannot be brought under the FTCA for the negligent provision thereof. *See Veillette v. United States,* 615 F.2d 505 (9th Cir. 1980); *Henning v. United States,* 446 F.2d 774 (3rd Cir. 1971), *cert. denied* 404 U.S. 1016 (1972); *Shults v. United States,* 421 F.2d 170 (5th Cir. 1969).

In this case, plaintiffs' son, Capt. Alan D. Peterson was an active-duty serviceman who was entitled to receive medical care at the Eisenhower Army Medical Center at Fort Gordon, Georgia. Such care was provided in the form of psychiatric treatment for approximately eight months prior to Peterson's death. After trying unsuccessfully to reach Peterson by phone after he missed a scheduled therapy session, the army psychiatrist notified Peterson's commanding officer. Capt. Peterson was found the following day at his residence, dead from a self-inflicted gunshot wound.

The Fifth Circuit recently heard an appeal from the dismissal of a case remarkably similar to the one at bar. In *Johnson v. United States,* Slip Op. No. 79-1485 (Decided November 17, 1980), plaintiff's husband was discharged from an army hospital even though his psychiatrist knew of his violent tendencies. Six days later, he killed his brother-in-law, shot his wife, and then comitted suicide. The dismissal was affirmed on grounds that the army's actions resulting in Johnson's death were directly and substantially related to his military service.

The Court must reach the same conclusion here. Peterson was receiving psychiatric treatment at the Eisenhower Medical Center because he was a military serviceman. Any negligence on the part of his doctor was incidental to

Peterson's military service. Accordingly, the United States' motion to dismiss is hereby GRANTED.

Order entered at Augusta, Georgia, this 8th day of January, 1981.

Dudley H. Bowen, Jr.
United States District Judge